ORIGINAL

Supreme Court, U.S.
FILED
OCT 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-451

DISTRIBUTED
OCT 19 1990

In The
Supreme Court of the United States
October Term, 1990

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,
Petitioner,

V.

JUNE M. BETTS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

ROBERT F. LAUFMAN
(Counsel of Record)
ALPHONSE A. GERHARDSTEIN
Laufman, Rauh & Gerhardstein
1409 Enquirer Building
617 Vine Street
Cincinnati, Ohio 45202
(513) 621-9100

Attorney s for Respondent

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... ii

BRIEF IN OPPOSITION 1

STATEMENT OF THE CASE..... 1

REASONS FOR DENYING THE WRIT 3

1. The Opinion Below Properly Followed This Court's Decision In Thurston..... 4

2. This Case Is Inappropriate For Review Because The Sixth Circuit Decision Was Based Upon Unique Facts..... 5

3. The Sixth Circuit's Opinion Is Reconcilable With This Court's Decision In PERS v. Betts..... 6

4. No Conflict Exists Among The Circuits..... 7

5. New Legislation Changes The ADEA And Makes Review Of This Case Inappropriate At This Time..... 9

CONCLUSION..... 11

APPENDIX..... A-i

TABLE OF AUTHORITIES

Cases **Page**

Betts v. Hamilton County Board of Mental Retardation and Developmental Disabilities, 897 F.2d 1380 (6th Cir. 1990) ..... passim

Chardon v. Fernandez, 454 U.S. 6 (1981) 7

Delaware State College v. Ricks, 449 U.S. 250 (1980) 7

EEOC v. Chrysler, 733 F.2d 1183 (6th Cir. 1984), rehearing en banc denied, 738 F.2d 167 (1984) 6

EEOC v. Maine, 644 F.Supp. 223 (D.Maine 1986) 7

EEOC v. Maine, 823 F.2d 542 (mem.) (1st Cir. 1987) 7

EEOC v. Westinghouse Elec. Corp., 907 F.2d 1365 (3rd. Cir. 1990) 8

Henn v. National Geographic Society, 819 F.2d 824 (7th Cir. 1987) cert. denied, 484 U.S. 964 (1987) 8-9

Public Employees Retirement System of Ohio v. Betts ___ U.S. ___, 109 S.Ct. 2854 (1989) ..... passim

Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985) 2, 4-6

Statutes

29 U.S.C. § 623(f)(2) ..... passim

The Older Workers Benefit Protection Act..... 9-11

Ohio Revised Code § 145.32 2

Ohio Revised Code § 145.39 3

Miscellaneous

136 CONG REC. S13,599 (daily ed. Sept. 24, 1990) 11

First Circuit Court of Appeals Loc.R. 36.2 8

No. 90-451

In the

SUPREME COURT of the UNITED STATES

October Term, 1990

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO, Petitioner,

v.

JUNE BETTS, Respondent.

BRIEF IN OPPOSITION

The Respondent, June M. Betts, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Sixth Circuit's opinion in this case. That opinion is reported at 897 F.2d 1380 (1990).

STATEMENT OF THE CASE

This Court, in Public Employees Retirement System of Ohio v. Betts,___ U.S. ___, 109 S.Ct 2854 (1989) (Pet. A-18), invalidated the EEOC employee benefit plan guidelines and held that provisions of a bona fide employee benefit plan were exempt from the Age Discrimination in Employment Act (ADEA) so long as the plan was not a method of discriminating in nonfringe-benefit aspects. However, this Court recognized that even bona fide employee benefit plans could not be used to justify forced retirement. It remanded the case to determine if June Betts was illegally forced into length-of-service retirement:

> As a result of the 1978 amendments, § 4(f)(2) cannot be used to justify forced retirement on account of age. Appellee contends, and the district court found, the

> appellee was forced to retire under the terms of PERS' plan, and that as a result § 4(f)(2) is unavailable to PERS. The Court of Appeals did not address this issue, and we express no opinion on it, leaving its resolution to that court on remand.

Id. at 2860 n.2 (Pet. A-24).[1]

Betts was denied disability retirement because of her age. She argued that exclusion from that program was tantamount to being cut from employment altogether. This Court's summary of the PERS disability retirement program demonstrated that disability retirees remain in employment status:

> "Employees who take disability retirement are treated as if they are on leave of absence for the first five years of their retirement. Should their medical conditions improve during that time, they are entitled to be rehired."

109 S.Ct. at 2858. (Pet. A-19).

On remand, the Sixth Circuit, "strongly influenced" by this Court's opinion in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985), held that the defendants violated the ADEA by denying Betts' application for disability retirement based upon her age. The Sixth Circuit explained its finding of forced retirement as follows:

> In 1985, when Betts was 61 years of age, her supervisor told her that under Ohio law she had only two possible alternatives: an unpaid medical leave, which would not entitle her to any benefits or a length-of-service retirement, which would entitle her to $158.50 a month. Ohio Rev. Code §§ 145.32 and 145.301(C). Had she been

---

1. This Court also remanded to provide Betts with an opportunity to demonstrate discrimination in nonfringe-benefits. 109 S.Ct. at 2868-69 (A-43). On remand, Betts and the EEOC argued that the denial of the right of reemployment constituted age-based denial of a nonfringe-benefit. The Sixth Circuit did not address this argument because its ruling on involuntary retirement was dispositive.

> under 60, the Ohio plan would have given Betts a third option: disability benefits with the possibility of being recalled if her condition sufficiently improved. Ohio Rev. Code § 145.39. As a disability retiree, rather than a length-of-service retiree, Betts would have remained an employee of Hamilton County and would have been entitled to return to work had her condition improved. She was denied this alternative because of her age. (emphasis supplied)

897 F.2d at 1381 (A-3).

The dissenting judge on the panel argued that "Betts was not forced to retire because of her age; rather she elected to retire, for health reasons..." (Pet. A-16). The panel majority rejected that analysis. It held that the forced retirement was Betts' preclusion from employment status altogether by forcing her into a program that had no reemployment rights. The court stated that exclusion from the disability program was an "age-based refusal to allow the employee to participate in a further reemployment opportunity," a right the court held to be "similar to a job since she would have been able to return to work had her condition improved." (Pet. A-5,6)

PERS moved for rehearing and rehearing en banc based upon the same arguments presented in its petition for certiorari. The Sixth Circuit denied both motions. (Pet. A-99).

REASONS FOR DENYING THE WRIT

This month, Congress amended the ADEA to overcome the effects of this Court's decision in PERS v. Betts. The unique combination of the old ADEA and judicial rulings that cause the present focus on Betts' involuntary retirement will never be replicated. It would be improvident for this court to grant certiorari to a case that will have no lasting impact on the law.

Furthermore, the Sixth Circuit's decision follows precedent set by this Court and that decision is not in conflict with those of other circuits.

1. The Opinion Below Properly Followed This Court's Decision In Thurston.

The Sixth Circuit's reliance on Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985) for guidance in analyzing whether the PERS plan forced Betts to retire is compelled by the similarity between the two cases. Under TWA's bona fide seniority plan, pilots under age 60 who were medically disabled or disqualified from serving as pilots were permitted to bump less senior flight engineers. Pilots over the age of 60 were denied this option. This Court held that the TWA seniority plan, which denied older pilots an employment opportunity available to younger pilots, "permitted" involuntary retirement in violation of § 4(f)(2).

Just as in Thurston, it is clear that the PERS disability plan discriminates against disabled employees on the basis of age. Betts was forced into the same situation as the disqualified pilots in Thurston. Both Betts and the pilots were disqualified from their jobs as the result of wholly lawful decisions: Betts was unable to perform her work; the pilots were removed from their jobs because age was a bona fide occupational qualification under existing regulations of the FAA. Both Betts and the pilots were effectively forced to accept regular retirement because another option, which was available to similarly situated younger workers, was denied to them solely because of age. Betts was denied disability on-leave status; the

pilots were denied "bumping" privileges to flight engineer. Just as the denial of continuing work forced retirement in Thurston, the denial of continuing employment status in the PERS disability program forced Betts' retirement. As in Thurston, the "initial retirement was valid,. . . but the age-based refusal to allow the employee to participate in a further employment opportunity made the § 4(f)(2) defense unavailable." Betts, 897 F.2d at 1382 (Pet. A-5).

PERS argues that Thurston is inapposite because this case involves an employee unable to continue working because of poor health (Pet. at 14). This misses the point. Under the PERS disability plan, younger employees who are unable to continue working because of poor health are given the option of reemployment should their health improve. Similarly situated workers over age 60 are denied this option and forced to retire. Thus, this case involves an employer's decision forcing disabled older workers to retire simply because of age, conduct which is prohibited by the mandatory retirement proviso of § 4(f)(2).

2. This Case Is Inappropriate For Review Because The Sixth Circuit Decision Was Based Upon Unique Facts.

The Sixth Circuit decision sets no new precedent but merely applied the facts to this Court's decision in Thurston. The Sixth Circuit clearly limited its decision to the facts of this case:

> This decision should not be read to undercut a company's ability to institute early retirement plans or require retirement for reasons of health or job performance. However, we follow the principle

> established by Thurston and Chrysler[2] that in administering retirement plans employers may not force older workers involuntarily into less desirable retirement programs on account of age. Such coercive conduct constitutes "involuntary retirement" under § 4(f)(2).

897 F.2d at 1383 (Pet. A-8)

Because the lower court's decision is limited to the facts, this case is inappropriate for review by this Court.

3. The Sixth Circuit's Opinion Is Reconcilable With This Court's Decision In PERS v. Betts.

PERS argues that the Sixth Circuit's decision nullifies this Court's decision in Betts. (Pet. at 9-10). That is not correct. In Betts, this Court expressed no opinion and declined to reach the involuntary retirement issue. 109 S.Ct.at 2860 n.2 (Pet. A-24).

PERS states that "in the eyes of the panel majority below, providing less desirable retirement benefits to older workers subjects them to illegal involuntary retirement because of age." (Pet. at 11). This misses the crux of that decision which held that the 5-year leave of absence was a valuable reemployment right.

> As a disability retiree, rather than a length-of-service retiree, Betts would have remained an employee of Hamilton County and would have been entitled to return to work had her condition improved. She was denied this alternative because of her age. (emphasis supplied)

897 F.2d at 1381 (Pet. A-3). Betts' retirement was involuntary because she was denied an employment right.

---

2. EEOC v. Chrysler, 733 F.2d 1183 (6th Cir. 1984), rehearing en banc denied, 738 F.2d 167 (1984)

PERS states that Betts has not recovered and could not have taken advantage of the leave of absence. This Court has held in other employment cases that the cause of action accrues when the employee is aware of the discrimination, not when the discriminatory act has its effect on the employee. See Delaware State College v. Ricks, 449 U.S. 250, 258 (1980) ("proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful"), Chardon v. Fernandez, 454 U.S. 6 (1981) (limitations began to run when notice of termination was given, not on date when employment ended). Thus, the cause of action accrues at the time a member is denied disability retirement because of age, not when a member recovers and seeks reemployment. Moreover, the issue is not moot since a decision for Betts will entitle her to the increased benefits that come with the disability program.

4. No Conflict Exists Among The Circuits.

PERS argues that the Sixth Circuit's decision conflicts with the First Circuit's unpublished decision in EEOC v. State of Maine, 823 F.2d 542 (mem.) (1st Cir. 1987). That argument is without merit for several reasons.

EEOC v. Maine, 644 F.Supp. 223 (D.Maine 1986) is factually different from Betts because the right to reemployment was never an issue in that case. The district court commented on involuntary retirement only in passing and without discussion. Id. at 225. The First Circuit, in a two-sentence unpublished decision, affirmed the district court without even mentioning involuntary retirement. (A-10). Moreover, citing the decision

itself is improper. First Circuit Loc.R. 36.2(b), provides "[u]npublished decisions may be cited only in a related case." Thus, there is no conflict with the First Circuit.

The Third Circuit decision cited by PERS, EEOC v. Westinghouse Elec. Corp., 907 F.2d 1365 (3rd. Cir. 1990) (Pet. A-101), is also distinguishable. Unlike Betts, all retirement eligible Westinghouse employees could choose between retirement and severance with recall rights.

> [N]o violation of the ADEA occurred because Westinghouse afforded an option to every retirement-eligible employee, whereby an employee could choose between participating in Westinghouse's retirement plan or participating in Westinghouse's 1982 severance plan, which included recall or transfer rights. (emphasis supplied)

907 F.2d at n.9 (Pet. A-118). Since there was no loss of employment rights based on age, retirement for Westinghouse employees was held to be voluntary. Moreover, the panel decision in Westinghouse is in doubt. The EEOC petitioned for rehearing or in the alternative suggested a rehearing In Banc. The panel has granted a rehearing. (A-3).

The Seventh Circuit case cited by PERS, Henn v. National Geographic Society, 819 F.2d 824 (7th Cir. 1987) cert. denied, 484 U.S. 964 (1987), is easily distinguished. National Geographic offered 15 of its employees the choice between 1) continuing employment and 2) early retirement with full retirement benefits plus one-year's salary plus full medical coverage. Three employees declined the offer and remained on the payroll. Four of the twelve who accepted the early retirement package filed the lawsuit. The Seventh Circuit held that an

inference of age discrimination was not supported when two factors, one neutral (continued employment) and one beneficial to the older employee (retirement with incentives) were present. Henn, 819 F.2d at 828. The Sixth Circuit distinguished Henn, observing that

> Betts, an older employee, was not given any choice of incentives. Quite the contrary: she was denied the choice of disability retirement which would have been available to her had she been one year younger.

897 at 1383 (Pet. A-8).

5. New Legislation Changes The ADEA And Makes Review Of This Case Inappropriate At This Time.

Recently enacted legislation significantly changes the landscape on employee benefit plans under the ADEA, making review of this case inappropriate at this time.

On October 16, 1990, President Bush signed S.1511, the Older Workers Benefit Protection Act (OWBPA). (A-6). In its findings, Congress stated that as a result of this Court's decision in PERS v. Betts, "legislative action is necessary to restore the original congressional intent in passing and amending the ADEA." (A-7). Among other things, the Act:

1. Omits the term "subterfuge" from the ADEA. See amended § 4(f)(2). (A-8).
2. Provides that bona fide employment benefit plans are not exempt because of their adoption prior to enactment of the ADEA. See new § 4(k) (A-9).
3. Expressly adopts the "equal benefit or equal cost" rule as permitted by EEOC Guideline 29 CFR § 1625.10. See new § 4(f)(2)(B)(i). (A-8).
4. Defines "compensation, conditions, or privileges of

employment" as used in § 4(a)(1) and elsewhere to include benefits provided pursuant to a bona fide employment benefit plan. See new § 11(1). (A-7).

5. Places upon the employer the burden of proving that its employee benefit plan is lawful. See amended § 4(f)(2). (A-9).

Additionally, the OWBPA expressly provides for voluntary early retirement incentive plans and for severance plan offsets. The new OWBPA substantially changes the ADEA and increases its complexity. The ADEA, as amended by OWBPA, will certainly be subject to much litigation in the future. Because of these changes, certiorari should not be granted in this case.

PERS argues that the new legislation does not address the question of what constitutes involuntary retirement pursuant to § 4(f)(2). (Pet. 10, n.1) Involuntary retirement in the context of employee benefit plans has been raised infrequently. In those cases where it has been raised, it was secondary to allegations that employees were denied benefits because of age. Had OWBPA been in place, Betts, Maine, and Westinghouse all would have been decided in plaintiffs' favor without ever reaching the involuntary retirement issue while the early retirement plan in Henn is expressly provided for by OWBPA.

Moreover, the forced retirement debate in these cases is quite dependent on analyzing the terms of each plan. The OWBPA requires PERS to amend its plan to eliminate terms causing forced retirement. State employee benefit plans, such as the PERS plans, must be brought into compliance within two years. The

Ohio Retirement Study Commission supported S.1511 and "intends to recommend to the Ohio General Assembly as soon as possible all changes necessary to place Ohio pension law in compliance with the letter and spirit of the Older Workers Benefit Protection Act."[3] This Court should not commit its precious judicial resources to review a PERS benefit plan which soon will be revised to eliminate the terms causing forced retirement.

Because of the changes mandated by OWBPA, any decision which this Court might reach in this case would have only a short-term impact. This Court should not review a case arising under a law which Congress has just amended in response to an earlier decision of this Court. Another round of Supreme Court litigation would provide little guidance for future litigants.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT F. LAUFMAN
(Counsel of Record)
ALPHONSE A. GERHARDSTEIN
Laufman, Rauh and Gerhardstein
1409 Enquire Building
617 Vine Street
Cincinnati, Ohio 45202
(513) 621-9100

Attorneys for Respondent

October 17, 1990

---

3. Letter from the Ohio Retirement Study Commission, to Senator Howard M. Metzenbaum, dated September 17, 1990. 136 CONG REC. S13,599 (daily ed. Sept. 24, 1990)

APPENDIX

TABLE OF CONTENTS

1. Decision of the United States Court of Appeals for the First Circuit in Equal Employment Opportunity Commission v. State of Maine, (Case No. 86-2022), entered May 21, 1987..... A-1

2. Order of the United States Court of Appeals for the Third Circuit in Equal Employment Opportunity Commission v. Westinghouse Electric Corp., (Case Nos. 86-1226 & 87-5174) granting EEOC's petition for Panel Rehearing, entered September 20, 1990..... A-3

3. The Older Workers Benefit Protection Act (Title I), enacted October 16, 1990..... A-6

[NOT FOR PUBLICATION]

United States Court of Appeals
For the First Circuit

No. 86-2022

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff, Appellant,

v.

STATE OF MAINE and MAINE STATE RETIREMENT SYSTEM,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MAINE

[Hon. Gene Carter, U.S. District Judge]

Before

Campbell, Chief Judge,

Torruella, Circuit Judge,

and Maletz,* Senior Judge.

Susan Elizabeth Rees with whom Johnny J. Butler, Acting General Counsel, Gwendolyn Young Reams, Associate General Counsel, and Mark S. Flynn, Acting Assistant General Counsel, were on brief for appellant.

Cabanne Howard, Deputy Attorney General, with whom James E. Tierney, Attorney General, was on brief for appellees.

May 21, 1987

*Of the United States Court of International Trade, sitting by designation.

Per Curiam. The Equal Employment Opportunity Commission appeals a summary judgment dismissing its claim against the State of Maine and the Maine State Retirement System in which it sought to have the Maine statute granting long-term disability benefits to state workers, 5 M.R.S.A. § 1122, declared invalid as contravening the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq., because it denies those benefits to workers who become disabled after reaching age 60. We have reviewed the allegations of the parties and conclude that the judgment of the district court should be affirmed for substantially the same reasons as indicated in that court's well-reasoned opinion. See E.E.O.C. v. State of Me., 644 F. Supp. 223 (D. Me. 1986).

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 86-1226 & 87-5174

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Appellant in 87-5174

v.

WESTINGHOUSE ELECTRIC CORPORATION,
Appellant in 86-1226

D.C. Civil Action Nos. 80-0853, 83-5457 & 84-4799

Before: HIGGINBOTHAM, Chief Judge,
SCIRICA and GARTH, Circuit Judges

O R D E R

Upon consideration of the Petition of the Equal Employment Opportunity Commission for Rehearing or in the Alternative Suggestion for Rehearing In Banc filed in the above matters, it is hereby ORDERED:

1. The Petition for Panel Rehearing is GRANTED.

2. The Clerk of the Court shall list the cases for argument before the original panel on Tuesday, October 9, 1990, at 11:30 a.m.

3. Counsel shall file supplemental briefs addressing the following questions:

a. In Public Employees Retirement System of Ohio v. Betts, 109 S. Ct. 2854 (1989), the Supreme Court gave the following example of a protection provided to older employees by § 4(f)(2) of the ADEA:

> an employer's decision to reduce salaries for all employees while substantially increasing benefits for younger workers might give rise to an inference that the employer was in fact utilizing its benefits plan as a subterfuge for age-based discrimination in wages, an activity forbidden by § 4(a)(1).

Id. at 2868. In what respect, if any, can this example be deemed analogous to the operation of Westinghouse's 1979 Plan? What salient aspects of Westinghouse's 1979 Plan implicate the same considerations as the illustration?

> (1) Do the facts of this illustration establish a substantive violation of 29 U.S.C. § 623(a)(1)? If so, what is the violation?
>
> (2) How, if at all, does the Westinghouse 1979 Plan discriminate as to a nonfringe-benefit aspect of the employment relationship?

b. In order to sustain a violation of the ADEA, must both discriminatory effect on recall and transfer rights and discriminatory intent pertaining thereto be proven?

c. What did EEOC prove or was it obliged to prove at trial to establish Westinghouse's discriminatory intent with respect to its 1979 Plan and/or with respect to recall and transfer rights?

> (1) What proofs can EEOC now present to demonstrate Westinghouse's intent? Has an offer of such proofs been made,[1] and if so, do the proofs presently offered differ from the proofs that were or should have been offered at trial?

---

1. EEOC should, in its response to this question, reference that offer and detail the proofs.

(2) Does any doctrine or principle dictate that this court should now provide EEOC with yet another opportunity to adduce proofs?

(3) If a remand as sought by EEOC were to be ordered, to what extent, if any, must the record be reopened?

Counsel for Equal Employment Opportunity Commission shall file its brief by Thursday, September 27, 1990. Counsel for Westinghouse Electric Corporation shall file its brief by 12:00 noon on Thursday, October 4, 1990.

BY THE COURT,

Circuit Judge

DATED: September 20, 1990

AMENDMENT NO. ____ Calendar No. ____

Purpose: To make a substitute amendment.

IN THE SENATE OF THE UNITED STATES—101st Cong., 2d Sess.

S. 1511

To amend the Age Discrimination in Employment Act of 1967 to clarify the protections given to older individuals in regard to employee benefit plans, and for other purposes.

Referred to the Committee on _____
and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended to be proposed by Mr. PRYOR (for himself, Mr. HATCH, Mr. METZENBAUM, Mr. HEINZ, and Mr. JEFFORDS) to the Committee amendment

Viz:

In lieu of the matter proposed to be inserted, insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Older Workers Benefit Protection Act".

TITLE I—OLDER WORKERS BENEFIT PROTECTION

SEC. 101. FINDING.

The Congress finds that, as a result of the decision of the Supreme Court in *Public Employees Retirement System of Ohio v. Betts*, 109 S.Ct. 256 (1989), legislative action is necessary to restore the original congressional intent in passing and amending the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.), which was to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations.

SEC. 102. DEFINITION.

Section 11 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 630) is amended by adding at the end the following new subsection:

''(l) The term 'compensation, terms, conditions, or privileges of employment' encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.''.

SEC. 103. LAWFUL EMPLOYMENT PRACTICES.

Section 4 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623) is amended—

(1) in subsection (f), by striking paragraph (2) and inserting the following new paragraph:

"(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section—

"(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this Act, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 12(a) because of the age of such individual; or

"(B) to observe the terms of a bona fide employee benefit plan—

"(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

"(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this Act.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a), because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this Act; or'';

(2) by redesignating the second subsection (i) as subsection (j); and

(3) by adding at the end the following new subsections:

''(k) A seniority system or employee benefit plan shall comply with this Act regardless of the date of adoption of such system or plan.

''(l) Notwithstanding clause (i) or (ii) of subsection (f)(2)(B)—

''(1) It shall not be a violation of subsection (a), (b), (c), or (e) solely because—

''(A) an employee pension benefit plan (as defined in section 3(2) of the Employee Retirement

Income Security Act of 1974 (29 U.S.C. 1002(2))) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

"(B) a defined benefit plan (as defined in section 3(35) of such Act) provides for—

"(i) payments that constitute the subsidized portion of an early retirement benefit; or

"(ii) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

"(2)(A) It shall not be a violation of subsection (a), (b), (c), or (e) solely because following a contingent event unrelated to age—

"(i) the value of any retiree health benefits received by an individual eligible for an immediate pension; and

"(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following

which the individual is eligible for not less than an immediate and unreduced pension,

are deducted from severance pay made available as a result of the contingent event unrelated to age.

''(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

''(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501(c)(17) of the Internal Revenue Code of 1986) that—

''(i) constitutes additional benefits of up to 52 weeks;

''(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

''(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

''(D) For purposes of this paragraph, the term 'retiree health benefits' means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age)—

"(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.); and

"(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act.

"(E)(i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $3,000 per year for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

"(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, and $24,000 for individuals age 65 and above.

"(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on the date of enactment of this subsection,

and shall be adjusted on an annual basis, with respect to a contingent event that occurs subsequent to the first year after the date of enactment of this subsection, based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

''(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

''(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

''(3) It shall not be a violation of subsection (a), (b), (c), or (e) solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions)—

''(A) paid to the individual that the individual voluntarily elects to receive; or

"(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.".

SEC. 104. RULES AND REGULATIONS.

Notwithstanding section 9 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 628), the Equal Employment Opportunity Commission may issue such rules and regulations as the Commission may consider necessary or appropriate for carrying out this title, and the amendments made by this title, only after consultation with the Secretary of the Treasury and the Secretary of Labor.

SEC. 105. EFFECTIVE DATE.

(a) IN GENERAL.—Except as otherwise provided in this section, this title and the amendments made by this title shall apply only to—

(1) any employee benefit established or modified on or after the date of enactment of this Act; and

(2) other conduct occurring more than 180 days after the date of enactment of this Act.

(b) COLLECTIVELY BARGAINED AGREEMENTS.—With respect to any employee benefits provided in accordance with a collective bargaining agreement—

(1) that is in effect as of the date of enactment of this Act;

(2) that terminates after such date of enactment;

(3) any provision of which was entered into by a labor organization (as defined by section 6(d)(4) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)(4)); and

(4) that contains any provision that would be superseded (in whole or part) by this title and the amendments made by this title, but for the operation of this section,

this title and the amendments made by this title shall not apply until the termination of such collective bargaining agreement or June 1, 1992, whichever occurs first.

(c) STATES AND POLITICAL SUBDIVISIONS.—

(1) IN GENERAL.—With respect to any employee benefits provided by an employer—

(A) that is a State or political subdivision of a State or any agency or instrumentality of a State or political subdivision of a State; and

(B) that maintained an employee benefit plan at any time between June 23, 1989, and the date of enactment of this Act that would be superseded (in whole or part) by this title and the amendments made by this title but for the operation of this subsection, and which plan may be

modified only through a change in applicable State or local law,

this title and the amendments made by this title shall not apply until the date that is 2 years after the date of enactment of this Act.

(2) ELECTION OF DISABILITY COVERAGE FOR EMPLOYEES HIRED PRIOR TO EFFECTIVE DATE.—

(A) IN GENERAL.—An employer that maintains a plan described in paragraph (1)(B) may, with regard to disability benefits provided pursuant to such a plan—

(i) following reasonable notice to all employees, implement new disability benefits that satisfy the requirements of the Age Discrimination in Employment Act of 1967 (as amended by this title); and

(ii) then offer to each employee covered by a plan described in paragraph (1)(B) the option to elect such new disability benefits in lieu of the existing disability benefits, if—

(I) the offer is made and reasonable notice provided no later than the date that is 2 years after the date of enactment of this Act; and

(II) the employee is given up to 180 days after the offer in which to make the election.

(B) PREVIOUS DISABILITY BENEFITS.—If the employee does not elect to be covered by the new disability benefits, the employer may continue to cover the employee under the previous disability benefits even though such previous benefits do not otherwise satisfy the requirements of the Age Discrimination in Employment Act of 1967 (as amended by this title).

(C) ABROGATION OF RIGHT TO RECEIVE BENEFITS.—An election of coverage under the new disability benefits shall abrogate any right the electing employee may have had to receive existing disability benefits. The employee shall maintain any years of service accumulated for purposes of determining eligibility for the new benefits.

(3) STATE ASSISTANCE.—The Equal Employment Opportunity Commission, the Secretary of Labor, and the Secretary of the Treasury shall, on request, provide to States assistance in identifying and securing independent technical advice to assist in complying with this subsection.

(4) DEFINITIONS.—For purposes of this subsection:

(A) EMPLOYER AND STATE.—The terms ''employer'' and ''State'' shall have the respective meanings provided such terms under subsections (b) and (i) of section 11 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 630).

(B) DISABILITY BENEFITS.—The term 'disability benefits' means any program for employees of a State or political subdivision of a State that provides long-term disability benefits, whether on an insured basis in a separate employee benefit plan or as part of an employee pension benefit plan.

(C) REASONABLE NOTICE.—The term ''reasonable notice'' means, with respect to notice of new disability benefits described in paragraph (2)(A) that is given to each employee, notice that—

(i) is sufficiently accurate and comprehensive to appraise the employee of the terms and conditions of the disability benefits, including whether the employee is immediately eligible for such benefits; and

(ii) is written in a manner calculated to be understood by the average employee eligible to participate.

(d) DISCRIMINATION IN EMPLOYEE PENSION BENEFIT PLANS.—Nothing in this title, or the amendments made by this title, shall be construed as limiting the prohibitions against discrimination that are set forth in section 4(j) of the Age Discrimination in Employment Act of 1967 (as redesignated by section 103(2) of this Act).

(e) CONTINUED BENEFIT PAYMENTS.—Notwithstanding any other provision of this section, on and after the effective date of this title and the amendments made by this title (as determined in accordance with subsections (a), (b), and (c)), this title and the amendments made by this title shall not apply to a series of benefit payments made to an individual or the individual's representative that began prior to the effective date and that continue after the effective date pursuant to an arrangement that was in effect on the effective date, except that no substantial modification to such arrangement may be made after the date of enactment of this Act if the intent of the modification is to evade the purposes of this Act.